IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

INCOME TAX REFERENCE No. 62 of 1995

For Approval and Signature:

HONOURABLE MR.JUSTICE D.A.MEHTA
HONOURABLE MS.JUSTICE H.N.DEVANI

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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HARSIDDH SPECIFIC FAMILY TRUST - Applicant(s)

Versus

COMMISSIONER OF INCOME TAX - Respondent(s)

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Appearance :
MRS SWATI SOPARKAR for Applicant(s) : 1,
MR MANISH R BHATT for Respondent(s) : 1,
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CORAM : HONOURABLE MR.JUSTICE D.A.MEHTA
and
HONOURABLE MS.JUSTICE H.N.DEVANI

Date : 17/01/2006

ORAL JUDGMENT

(Per : HONOURABLE MR.JUSTICE D.A.MEHTA)

1.The Income Tax Appellate Tribunal, Ahmedabad Bench “A” has referred the following two questions under Section 256(1) of the Income Tax Act, 1961 (the Act) at the instance of the assessee:

> “[1] Whether on the facts and in the circumstances of the case, the Tribunal while deciding the assessee's appeal against the order passed by the learned CIT u/s 263 of the I.T. Act had jurisdiction to direct the A.O. to make proper investigation and then decide the question of allowability of additional commission in accordance with law?
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> [2] Whether, on the facts and in the circumstances of the case, the Tribunal should have cancelled the order of the CIT u/s 263 directing the A.O. to disallow the additional commission?”

2.The assessment year is 1986-87 and the relevant accounting period is calender year 1985.

3.The assessee had made a claim for deduction of a sum of Rs.1,90,18,508/- towards commission. This was comprised of two parts: (1) regular commission which was deducted by the consignees before the sale proceeds were remitted to the assessee, and (2) additional commission which was over and above the amount of commission payable to consignee distributors as per agreement entered into by the consignee distributors with the assessee. The assessing officer allowed the claim while framing the assessment order.

4.The Commissioner of Income Tax, Gujarat Central, initiated action under Section 263 of the Act and came to the conclusion that the assessing officer had not made proper inquiries and verified the claim regarding additional

commission. According to the Commissioner, the claim was premature and was only in the nature of provision. That the assessee would, however, be free to claim the same when the commission was actually paid. He, therefore, directed the assessing officer to disallow the assessee's claim and revise the assessed income.

5. Being aggrieved, the assessee carried the matter in appeal before the Tribunal. Vide order dated 27/8/1993, the Tribunal upheld the invocation of Section 263 of the Act, but modified the order of Commissioner to the extent of setting aside the direction to finally disallow the commission, by substituting the same with a direction to the assessing officer to make proper inquiries and then, decide whether the additional commission was allowable or not.

6.Mr.S.N.Soparkar, the learned senior advocate appearing on behalf of the applicant – assessee, submitted that the Tribunal had committed an error in modifying the order of CIT u/s 263 of the Act by substituting the direction of CIT. The contention was that the Tribunal could only uphold the order of CIT (Appeals) or hold that the same was bad in law. The Tribunal could not partially uphold the order of CIT, namely, upholding the assumption of jurisdiction u/s 263 of the Act and yet, modifying the direction made by CIT by restoring the matter to the file of the assessing officer. This submission was based on the premise that the assessee was in appeal before the Tribunal and hence, the Tribunal was only required to determine whether the order of CIT was justified or not.

7.Mrs.M.M.Bhatt, the learned standing counsel appearing on behalf of the respondent has

supported the order of Tribunal.

8.As can be seen from the facts on record, the Tribunal has come to the conclusion that though CIT had rightly exercised jurisdiction u/s 263 of the Act, the evidence on record was insufficient to finally hold that the assessee was not entitled to claim deduction of additional commission. The Tribunal, therefore, modified the order of CIT by substituting the final direction to the assessing officer of disallowing the claim of additional commission and instead, directed the assessing officer to make proper inquiries, and then decide whether additional commission was allowable or not.

9.Section 254(1) of the Act stipulates that the Appellate Tribunal may, after giving both the parties to the appeal an opportunity of being heard, pass such orders thereon as it thinks

fit. On a plain reading, it is, thus, apparent that no fetters are placed on the powers of the Tribunal to pass an order in appeal before it, except for the fact that an enhancement may not be permissible in absence of any cross appeal or cross objection. The Legislature having couched the provision in the widest manner to pass such orders in the appeal as the Tribunal thinks fit, it would be incorrect to restrict the said powers in any manner whatsoever. Of course, the powers have to be exercised in consonance with the provisions of the Act and in accordance with the law. There is no warrant to read any restriction on the powers that the Tribunal can exercise in the circumstances like the one obtaining in the present case.

10.The Commissioner, while passing the order u/s 263 of the Act, had directed disallowance of the additional commission without anything

more. The Tribunal has modified the same with a direction to the assessing officer to make inquiries and then disallow the claim, if the facts so warrant. In fact, the order of Commissioner is modified in favour of the assessee and no prejudice is shown to have been caused to the assessee. Instead of the entire amount being disallowed, in the event of the order of Commissioner being confirmed in toto, the assessee has been granted an opportunity of leading evidence and satisfying the assessing authority that the claim made is valid, legal and tenable at law. The assessee could have no grievance in this fact situation.

11. In fact, during the course of hearing, it was submitted on behalf of the applicant assessee that, in other matters of the group, wherein similar orders were made by CIT u/s 263 of the Act, and wherein the Tribunal had made similar directions, the assessing officer has allowed

the claim of the group concerns after investigation and appreciating the evidence on record. The learned counsel, however, hastened to add that, in the present case, the assessing officer had not carried out the necessary investigation as directed by the Tribunal, and hence, the Tribunal should be directed to ensure compliance of its direction.

12.In relation to the last contention, suffice it to state that it cannot fall within the scope of this reference and if the assessee is aggrieved by any inaction on part of the assessing officer, it is for the assessee to take appropriate action in accordance with law, including moving the Tribunal in appropriate proceedings.

13.In light of what is stated hereinbefore, question No.1 is answered in the affirmative and question No.2 is answered in the negative

i.e. both the questions are answered in favour of the revenue and against the assessee.

14.The Reference stands disposed of accordingly. There shall be no order as to costs.

[D.A.MEHTA, J.]

[HARSHA DEVANI, J.]

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